Assigned Judge: Coughenour

BILL WALKER
PRO SE

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

BILL WALKER, PLAINTIFF, v. THE UNITED STATES OF AMERICA, Defendant	RESPONSE TO DEFENDANT'S CROSS-MOTION TO DISMISS NOTE ON MOTION CALENDAR: FEBRUARY 16, 2001 C. A. No. C00-2125C

INTRODUCTION

Fed. CR 8(d)states:

"Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

It is a well settled principle of law that if the parties stipulate to the facts, obviously then no genuine dispute as to material facts exist for a factfinder to resolve.[i] Further, to quote defendant's own motion to dismiss:

"A motion to dismiss should ordinarily not be granted unless it can be demonstrated beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct.99 (1957). In ruling on such a motion, a district court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party. Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 984 (9th Cir. 2000)."

Summed up these civil rules and case law can only mean if the plaintiff can provides a set of facts in support of his claim which would entitle him to relief, his claim cannot be dismissed or if the defendant in the case does not deny an averment by the plaintiff, it must be considered to have been admitted by the defendant, i.e., is a non-disputed fact which the defendant admits prove (or help to prove) plaintiff's complaint. Therefore, a complaint by a plaintiff can be proved either by the plaintiff providing a series of facts or by the defendant admitting them or a combination of either. In any case, if these provide a set of facts whereby the plaintiff can provide a set of fact in support of his claim which would entitle him to relief, his claim cannot be dismissed.

As noted by defendant United States, the Court previously dismissed his first brief as overlength.[ii] In his brief in support of allowing the overlength brief, plaintiff stressed two primary arguments for the Court to permit it: the large volume of evidence and the

number of unresolved questions surrounding the issue of a convention to propose amendments. In denying his motion to file an overlength brief, plaintiff assumes the Court took the matter seriously and thus simply did not summarily reject his overlength brief because of its size, but instead at least reviewed it so as to familiarize itself with the content and text to determine whether such depth and scope were required in order to resolve the issues presented by the plaintiff in his complaint and explain the basis of those matters dealt with in his proposed order.

As the questions raised by the United States in its motion to dismiss were addressed in the overlength brief[iii] and such issues were not enough to persuade the Court as to the need for an overlength brief, the only logical conclusion that can be drawn from the action of the Court is it considers the questions raised by the United States to already be "well settled." Further, it is logical the conclusions specified by the plaintiff in his overlength brief and which, in fact, defeat defendant's objections are "well settled.". It is not surprising the Court found the issues presented in the overlength brief to be "well settled" as plaintiff used over 200 Supreme Court rulings to arrive at his conclusions.

This conclusion of "well settled" also addresses the issue of evidence of applications by the states. Details of the 564 individual applications from all 50 states were presented by plaintiff at three times in his overlength brief. Thus the Court had ample opportunity to have this detailed evidence before it and chose not require it. It can only be presumed, therefore, the Court felt it did not require such depth of evidence in order to make its ruling. Therefore, the summation of references by the plaintiff based on CR 1006 describing the 564 applications from all 50 states for a convention to propose amendments must be considered sufficient proof of fact as to the states fulfilling, in fact

exceeding, their constitutional power to apply for a convention to propose amendments. None of these applications have been challenged by the United States as factual evidence.[iv] Thus, it must be assumed under rule CR 8(d)the evidence of applications by the 50 states is admitted.[v]

These legal facts established, plaintiff will now respond to defendant United States' motion to dismiss.

FACTS NOT DENIED BY UNITED STATES

First, defendant does not deny plaintiff's statement of fact concerning jurisdiction and venue.[vi] As previously noted, Court rules demand the conclusion defendant admits this Court has jurisdiction and venue as cited in plaintiff's brief.

Defendant's motion to dismiss begins by summarizing plaintiff' complaint. Defendant's motion (in part) states:

> "Plaintiff's lawsuit alleges that Congress has ignored Article V of the Constitution and violated his constitutional rights by failing to heed the call of two-thirds of the States to call a Constitutional Convention to consider proposed amendments to the Constitution. Specifically, plaintiff alleges that Congress' purported refusal to convene a Constitutional Convention has violated his right to seek elected office—i.e., that of delegate to a Constitutional Convention; his right to vote on any amendments that are ultimately the product of such a Convention; and his "right of redress." Complaint at ¶ 4. The Complaint seeks a Judgment against Congress in the form of an Order compelling Congress to comply with Article V of the Constitution and to call a Constitutional Convention."
>
> In addition to the Complaint, plaintiff also filed a Motion seeking Declaratory and Injunctive Relief, which includes an expansive Order compelling Congress to convene and conduct a Constitutional Convention via the Internet and prescribing the procedural rules in accordance with which the Convention shall proceed. … The instant Opposition and Cross-Motion demonstrates that plaintiff's motion must be denied and, moreover, that the United States' cross-motion should be granted…"[vii]

Defendant United States then continues its objections to plaintiff's motion based on non-justiciability, standing and political question issues which will be addressed by plaintiff later in this response.

First, plaintiff will correct defendant United States "interpretation" of Article V. States do not issue a call. Instead, according to Article V, the states apply for a convention to propose amendments. The states are not authorized by Article V to apply for a Constitutional Convention. Further, by implication, defendant United States distorts the phrase of Article V in such a manner as to imply the convention to propose amendments must consider amendments already written before the convention convenes (presumably by the states in their applications) and thus is not free to propose amendments. The plain language of Article V rejects this distortion. The states are granted to power to apply for a convention to propose amendments. The convention in turn, proposes amendments which are then submitted to the states for their consideration under ratification process prescribed in Article V. Thus, only Congress and the convention are actually authorized to propose amendments; the states are not.

Defendant United States then denies plaintiff's lawsuit "compel[ling] Congress to comply with Article V of the Constitution and to call a *Constitutional Convention*." (emphasis added). The facts are different. No where, except as it refers to the 1787 Constitutional Convention or in quotes used by other sources in his overlength brief which the Court has denied, is the term "Constitutional Convention" used by the plaintiff. The plaintiff does not seek a "Constitutional Convention" in his complaint. He does not ask that the Court compel Congress "to call a Constitutional Convention." No where in his order is the term "Constitutional Convention" used. The term is not used anywhere in

his replacement brief. Equally significantly, the Constitution of the United States does not use the term. Thus, it is silent on the matter. The Supreme Court in discussing Article V does not use the term.[viii]

> This use of the term "Constitutional Convention" is not merely a simple snafu in words by the defendant. There is a distinct legal difference between the term used by the plaintiff in his complaint, brief and proposed order, "convention to propose amendments" and the term used by defendant United States in its motion to dismiss, "Constitutional Convention". The words are not legally synonymous nor are they interchangeable. They have a distinct difference in purpose and meaning as well as legal validity.

In its motion defendant United States quotes Article V of the United States Constitution. The quoted part of Article V reads:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress…"[ix]

It is immediately clear Article V authorizes "a Convention for proposing Amendments." Thus such a convention is given legal constitutional status. But it is in the limitation of such a convention also expressed in Article V that the legal significance between a convention to propose amendments and a "Constitutional Convention" is significant. Not once but twice does Article V use the term "of this Constitution." First, it uses the term to limit the amendatory power of Congress allowing it only to propose amendments to the current Constitution. In the second instance, the term is used again to achieve the same purpose in regards to a convention to propose amendments: to limit its

power to proposing amendments to the current Constitution. Thus, Article V does not authorize a convention to propose amendments to propose an entirely new constitution. That power is not legally recognized by the Constitution, nor is the term used by the Supreme Court in its references to the issue.

It is clear, based on the actions of the Constitutional Convention of 1787, that the power of a "Constitutional Convention" is to write a new constitution, not amend the old form of government. In using the term therefore, it is the *United States*, not the plaintiff, that suggests the current United States Constitution be thrown out. The current United States Constitution does not recognize such power nor does it authorize such power to a convention to propose amendments. Therefore such power does not constitutionally exist. Thus, while a convention to propose amendments does have legal validity or standing, it may not write a new constitution.[x] A "Constitutional Convention" which defendant United States suggests be called, does not have legal validity or standing, but does have the power to write a new constitution. Hence, the two terms refer to two separate functions and subjects, one of which is legal, limited and described under the terms of Article V and the other which is not legal, unlimited and not described in Article V or anywhere else in the Constitution. Defendant United States in its motion to dismiss only refers to the illegal, unlimited and undescribed subject, not the legal, limited and described subject referred to in plaintiff's complaint, brief and order.

Defendant United States has denied in its motion to dismiss plaintiff's "…[O]rder compelling Congress to convene and conduct a Constitutional Convention…".[xi] This the plaintiff has not done. The fact is plaintiff's complaint requests the Court to compel Congress to call a convention to propose amendments by means of declaratory and

injunctive relief. As defendant United States denies something that has no legal validity, is not recognized by the Constitution of the United States nor the Supreme Court of the United States, it is clear defendant is denying something other than what plaintiff has averted in his complaint, brief and order. Thus defendant United States has not denied plaintiff's complaint or motion. Hence, under CR 8(d) defendant United States has failed to deny plaintiff's complaint in any manner whatsoever, referring instead to something not contained in plaintiff's complaint, brief or order. Therefore under CR 8(d) that which is not denied by the defendant is admitted and thus plaintiff's complaint must be considered to have been admitted in full by defendant United States.

Even allowing, which CR 8(d) does not, for an error on the part of the United States, its motion to dismiss does not specifically deny the following averments made by the plaintiff in his brief and thus defendant admits:

Jurisdiction and venue, p.1, ¶ 1,2; Congress is obligated to call based on a "single numeric stand of two-thirds of the applying state legislatures, p.1, ¶ 3; this obligation is non-discretionary, p.1, ¶ 3; that all 50 states have submitted applications, a number well in excess of the two-thirds threshold, there is no time limit on the applications or that they must deal with the same subject "or any other requirement upon the legislatures other than a numeric count." p.1, ¶ 4; that as 50 states have submitted applications for a convention to propose amendments and as this exceeds the two-thirds requirement of Article V; the two-thirds requirement is thus satisfied. p.1, ¶ 5; that the clear intent of the Founders was Congress have no discretion in the matter of calling a convention, p.1, ¶ 6; that Congress has violated the clear language and plain intent of Article V, p.1, ¶ 6; that

the United States Government has admitted Article V requires no interpretation and is plain in its meaning.[xii] p.1, ¶ 6.

Further, defendant United States admits:

The central issue facing the Court is "the definition of the word 'shall' as used in the Constitution" and whether or not that term is obligatory or optional on those it is meant to affect and, under the terms of the equal protection clause such definition must extend to all uses of the word throughout the entire Constitution. p.1, ¶ 7; that word "foregoing" as used in the necessary and proper clause clearly precludes congressional interference outside the scope of Article I and thus regulation of the convention by means of legislative enactment is unconstitutional and further that as participation of the President of the United States in the amendatory process is precluded, legislative enactment by Congress "is clearly precluded."[xiii] p.1-2, ¶ 8; that under the terms of the 14th Amendment's equal protection clause together with the immunities and privileges clause support the fact that all citizens who are empowered to propose amendments to the Constitution must be elected by their fellow citizens in order to be elevated to that position and that they are equal in status to members of Congress and thus under the Speech and Debate Clause may not be regulated by an outside body such as Congress, p.2, ¶ 1; that as the state legislatures have applied for a convention, and as Congress is obligated under the terms of Article V to call a convention, it is clear the next step in the process is the election of delegates to such a convention. In refusing to call a convention when so mandated, Congress has therefore not only violated the rights of the states, but the people as well in their right to alter or abolish." p.2, ¶ 2.

Defendant United States further admits that:

The people's right to alter or abolish is the basis of sovereignty of this nation and that actions of Congress violate the unenumerated rights of the people in the Ninth Amendment; p.2-3, ¶ 3; that the reasoning expressed by plaintiff in reach this conclusion is correct as to facts, law, logic and inference, p.2-3, ¶ 3.

In sum therefore, the United States admits to the fact the states have satisfied the numeric requirement expressed in Article V and that Congress is obligated to call a convention and such obligation is non-discretionary, that no standard other than numeric count of applying states can be attached to the applications and that Congress has violated the clear language of Article V. It further admits to the fact Congress in no manner whatsoever may legislate to regulate or otherwise control a convention to propose amendments and that delegates to a convention must be elected by their fellow citizens. The United States admits Congress' current action violates the Ninth Amendment of the United States Constitution. In short, the United States position in their motion to dismiss is that Congress must, without discretion, call a convention to propose amendments, that Congress has not done so, that it is mandated to do so without discretion on the part of Congress, that this action violates the Constitution as well as violating the rights of the people guaranteed in that Constitution. The fact defendant United States admits it must call a convention to propose amendments which is the essence of plaintiff's complaint, ends the matter of dismissal. The plaintiff has presented a set of facts, outlined above, that the defendant United States has not denied and thus must be considered as admitted to by the defendant. These facts create an unbroken chain which totally support the motion of the plaintiff, which is an order compelling Congress to do an act the United States admits it is obligated to do, a set of facts which certainly grant the plaintiff relief.

And, by their admissions, these facts have been established both by the plaintiff and by defendant United States. On this basis alone, the motion by defendant United States to dismiss plaintiff's motion must be denied by the Court and his original motion granted.

THE ISSUE OF STANDING

Primarily, defendant United States motion to dismiss is based on plaintiff's alleged lack of standing, and the narrow ledge of political question. Defendant maintains that because of these issues, the matter is non judiciable and thus the Court cannot act. Putting aside the fact the defendant has admitted to a set of facts which it concedes obligate it to perform the act which is sought by the plaintiff in his complaint for the moment, plaintiff will address the issue of standing raised by defendant United States.

Defendant United States discusses in detail the three aspects of standing: (1)injury in fact,(2)the injury is fairly traceable to the challenged action of the defendant; and (3) it is "likely" as opposed to "speculative", that the injury will be redressed by a favorable decision. Defendant primarily relies on Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992) as his source in this matter.

Defendant then itemizes the injuries alleged by plaintiff stating:

"The Complaint alleges the following injuries: violation of plaintiff's right to seek the elected office of delegate to a Constitutional Convention; violation of plaintiff's right to vote on any constitutional amendments that a Constitutional Convention, if called, might generate; and violation of his right to redress grievances through the amendatory process set for in Article V. complaint at ¶4; see also Brief in Support of Motion for Declaratory Relief at 4-5."[xiv]

An examination of plaintiff's complaint is in order so as to establish the true facts of the case. Paragraph Four of the complaint reads:

"The refusal by Congress, in its official capacity, to call a convention to propose amendments, has violated several guaranteed constitutional rights of the plaintiff including his right to vote, right to associate, right to seek elected office, right of redress and right to alter or abolish. Further, such refusal is violation of the Constitution per se as well as a violation of several well established constitutional principals, chief among them the separation of powers doctrine."[xv]

Defendant United States, as shown earlier in this brief, has already admitted to all facts, law, logic and inference regarding the right of alter or abolish. It does not deny its action is a violation of the Constitution per se as well as a violation of several well established constitutional principals, chief among them the separation of powers doctrine. A simple comparison between defendant's denials of standing and plaintiff's assertions of standing show the simple fact the United States failed to deny as a basis of standing, plaintiff's right to alter or abolish. Indeed, defendant never mentions this issue of standing once in its entire motion to dismiss. Thus it cannot be said this standing issue has been denied by the defendant.[xvi] CR 8(d) as described earlier in this response leaves only one conclusion: plaintiff has standing under his right to alter or abolish and defendant United States admits this fact.

Once standing is established, plaintiff is under no obligation to prove it repeatedly. Thus, he could choose to simply move on in this response. But because defendant United States has so distorted the other standings of the plaintiff as to be unrecognizable, plaintiff feels an obligation to set the factual record straight and thus, in the end, provide more than one basis on which plaintiff has standing.

Defendant United States claims plaintiff basis his standing (in part) on a "violation of plaintiff's right to vote on any constitutional amendments that a Constitutional Convention, if called, might generate…"[xvii] This statement is entirely

false. Plaintiff's intent as the right to vote and the denial of his right to vote was meant entirely to refer to the right of the plaintiff to vote in a public election where candidates for the elected office of delegate to a convention to propose amendments would be decided, i.e., an election for national public officials.[xviii] This right has been recognized by the Court.[xix] It is also clear that as the convention to propose amendments is contained entirely in the United States Constitution, it is federal in nature and thus delegates to such a convention must be considered to be national officers. As the United States has admitted to the facts, law, logic and inference of the right to alter or abolish and as part of that doctrine established that members of Congress and delegates to a convention form a class which must receive equal protection under the law, i.e., treated the same under the law which in this case must be the United States Constitution, it is clear that an established right to vote for national officers includes the election of convention delegates.

The specific injury to the plaintiff in this context is clear. The plaintiff has been denied his right to vote in an election for convention delegates thus denying him right to choose who will represent him in a national office. As to whether or not he would meet voting qualifications for this office, it is clear if the plaintiff is legally qualified to vote for national officers such as members of Congress, which he is,[xx] he is legally qualified to vote for convention delegates as the equal protection clause dictates nothing less than this standard for a legal class.

Congress has refused to call a convention to propose amendments. This fact is admitted by defendant United States. This action, and only this action, prevents an election from occurring in which plaintiff is legal entitled to participate in. Thus, the

second aspect of standing is satisfied: that the injury is fairly traceable to the challenged action of the defendant. In fact in this case, it is absolutely traceable to the challenged action of the defendant.

This then leads to the third leg of standing: whether it is "likely" as opposed to "speculative" that the injury will be redressed by a favorable decision of the Court. To answer this question requires a presumption on the part of the plaintiff which he will deal with more fully later in this response: plaintiff assumes Congress will obey a Court order finding that its refusal to call a convention to propose amendments is unconstitutional and mandating that it call a convention and that it has no discretion or option in the matter either as to the call or the regulation of the convention. Assuming this, then it is entirely likely, as opposed to speculative, a Court decision favorable to the plaintiff, will redress not only the violation of his constitutional rights but satisfy violations of the Constitution as well. As the defendant United States has admitted it must call such a convention, and has not suggested it would do otherwise, it is a reasonable presumption Congress will call if commanded to do so by Court order.

The states, through their legislatures, have more than exhausted their power of application. The defendant United States has admitted the state legislatures have applied in sufficient number to satisfy the two-thirds requirement of Article V and also admitted that Congress must call without discretion or option. Thus, it is a reasonable presumption from a legal standpoint to consider this step (the mandated call by Congress) in the amendatory process to be guaranteed and automatic. Thus, the process of a convention, based on the admissions of defendant United States and the factual record of state application has served to extend this process beyond the point of the obligatory call.

What then follows next in this process? The election of delegates and the formation of the convention itself. As the process has constitutionally reached this point already, it is clear the Court in making any decision regarding it is not only called upon to review any infringement of rights before the call but afterwards as well.

The fact Congress has not called a convention cannot be considered a barrier when the Court considers what rights have been infringed by Congress not calling a convention to propose amendments as this would legitimize in some manner an otherwise illegitimate act. Who then has been affected by the refusal of Congress to call when obligated to so? Clearly a required election cannot occur until Congress calls and by refusing to call Congress violates the rights of those who have the right to participate in such an election. As the choosing of delegates is clearly a right of the people exercising their right to vote and as plaintiff has this right, it is clear the action of Congress is depriving him of this right.

The issue is concrete and particularized. Congress is denying plaintiff his right to vote in a specific election mandated by the Constitution by withholding a call for a convention to propose amendments which it admits it must do. This call once it has occurred, in turn causes an election for delegates to the convention to occur, an election of which plaintiff is legally qualified to participate in. Denial by Congress of the call denies plaintiff his right to vote in this specific election. As there is no election, this injury is clearly actual and not speculative or hypothetical. Congress therefore holds it may withhold elections mandated by law without any compelling state interest justifying such an act or the constitutional authority to do so. Congress claims the power of dictatorship. Thus denial of

plaintiff's right to vote is a basis for standing as plaintiff has satisfied all three requirements of standing.

Defendant United States then discusses its own theory as to who would be "represent the State of Washington at a Constitutional Convention" phrasing the issue "an open question."[xxi] Defendant states that:

> "Both Article V of the Constitution and the Washington State Constitution are completely silent concerning the subject of delegates to a convention to amend the U.S. Constitution. Whether elected delegates separate and apart from the members of the Washington State Legislature would represent the State of Washington at a Constitutional Convention is thus an open question."[xxii]

While Article V may be silent, the United States Constitution is not regarding this novel suggestion by defendant United States.[xxiii] Plaintiff has already discussed the 14th Amendment in his replacement brief and earlier in this response and the fact that its clauses compel an open, public election of delegates. The matter does not rest there. Plaintiff has already discussed the fact the convention clause is entirely federal in nature as is the rest of the amendatory article.[xxiv] As such, this clause is effected by the rest of the Constitution and one of these clauses is Article I, Section Six, Clause 2 which in sum prevents members of Congress from holding other civil offices simultaneously or members of civil offices being members of Congress simultaneously.[xxv] As defendant United States has admitted the effect of the 14th Amendment apply to both member of Congress and convention delegates and that both receive equal protection of law, it follows the above cited clause of the United States Constitution applies equally to members of Congress as well as convention delegates and thus the Constitution specifically forbids such action as a legislature simply becoming convention delegates without first (a)resigning their offices as legislature and (b) suffering review and approval via means of

election of the people before assuming the office of delegate. Thus the Constitution speaks volumes on this discredited proposal.

Defendant United States then discusses "[p]laintiff's claim that his right to vote on amendments that might be generated by a Constitutional Convention is likewise conjectural."[xxvi] As plaintiff's reference to "right to vote" in fact has nothing to do with voting on proposed amendments, this argument of defendant United States is defeated on its face.

Defendant United States then discusses plaintiff's right to petition the government for redress of grievances as guaranteed in the First Amendment. Defendant United States again creates another novel legal theory without any support of fact or reference. Defendant suggests that "by applying to Congress to convene a Constitutional Convention a state legislature could be construed to be seeking redress from the Federal government…"[xxvii] Clearly, the decision as to whether submit an application for a convention to propose amendments is a state power under exclusive control of the state legislatures. Only after the state has submitted the application does it become subject to the Federal Constitution. Only because there are a sufficient number of applications from a sufficient number of states is the federal Court involved in this issue. This power of application is denied the federal government by the clear language of the Constitution. Thus the term, "seeking redress from the Federal government" is factually incorrect. The state legislatures simply are exercising a power granted to them by the United States Constitution. They do not require the permission of the Federal government for this exercise of power and thus the states do not seek redress. They exercise a right.

The same principle applies to the right of plaintiff to seek redress. Defendant in his overlength brief held the refusal of Congress

to call a convention to propose amendments deprived plaintiff of a mechanism of redress permitted to him by the Constitution, i.e., a constitutional to propose amendments.[xxviii] This fact alone refutes defendant's state that "the Constitution affords citizens no mechanism, and certainly no right, to insist that Congress convene a Constitutional Convention…"[xxix] Defendant United States ignores the clear intent of the convention method of amendment of the Constitution. The convention to propose amendments is itself a mechanism of redress and the words of Article V which defendant United States admits allow no discretion create a right by allowing for the mechanism of a convention to propose amendments that might not otherwise be proposed by Congress or opposed by other elements within the government. In short, the convention to propose amendments helps citizens preserve their right to regulate their government and the convention itself is the mechanism whereby this regulation takes place.

As part of that process, it is clear plaintiff as an ordinary citizen, has the right to participate in its process; as a voter to help select which delegates will represent him at the convention and as an advocate for such proposed amendments as he may be disposed to support. Just as with Congress, the plaintiff has the right to urge members of Congress to vote against or for a legislative proposal, or proposed amendment, to write letters of said support or opposition, to send e-mails, to gather others in petitions expressing a similar point of view, to make speeches to members of the general public if he so chooses, to rally public support through the general media if he can. All this and much more, the courts have recognized are respected rights of citizens that cannot suffer government infringement. Congress in its refusal to call a convention to propose amendments which defendant United States admits it must do, has thwarted plaintiff's right to such

redress in a convention to propose amendments. In this area, plaintiff claims both definitions of right of redress, that which the United States refers to, a right and mechanism guaranteed in the Constitution and his right to exercise clearly recognized political rights in his participation of the process of the convention to propose amendments.

As the refusal of Congress to call a convention to propose amendments as it admits it must do is the direct cause of the denial of plaintiff's right of redress. Thus, the second leg of standing is satisfied. A Court ruling favorable to the plaintiff in this instance will cause a convention to propose amendments to occur. This in turn will make it likely, as opposed to speculative, that in the deliberative portion of the convention where its delegates are debating various amendment proposals, the plaintiff will have its opportunity to exercise his rights of redress as outlined above to the various delegates in support or opposition to various amendment proposals. The injury to plaintiff is concrete and particularized as the action of Congress prevents a specific form of redress allowed by the Constitution (exercise of political rights at a convention to propose amendments) by the plaintiff. Thus all elements of standing are satisfied.

As to plaintiff's issue of right to seek elective office, the only question here defendant raises is whether or not plaintiff would meeting the qualifications for a delegate. Defendant United States in its motion to dismiss states:

"Similarly, even were private citizens eligible to seek election as delegates to a Constitutional Convention, there is no way to know whether plaintiff would meet whatever eligibility requirements might ultimately be required of prospective delegates. Accordingly, plaintiff's allegation that his right to seek election as a delegate to a Constitutional Convention is neither "concrete and particularized" nor "actual and imminent," but rather entirely conjectural and hypothetical."[xxx]

Plaintiff has no response to the eligibility requirements of prospective delegates to a Constitutional Convention as plaintiff has already shown, a Constitutional Convention has no legal standing and thus such eligibility requirements would be entirely conjectural and hypothetical. However he does not entirely agree with defendant's statement that:

> "Although the purpose of a Constitutional Convention is to consider amendments to the Constitution, the fact that there has never been such a Convention since the Constitution itself was adopted affords little insight into the probability that the product of such a convention will, in fact, be one or more proposed amendments."[xxxi]

Plaintiff agrees it is unknown what a "Constitutional Convention" might do. Unlike a convention to propose amendments, which is what the plaintiff's motion deals with, the Constitutional Convention has no limits set by the Constitution as does a convention to propose amendments. This sly attempt at suggesting a runway convention however falls short because it does not address the already explained limitations on a convention to propose amendments. Instead, it deals with a constitutionally unrecognized and therefore unlawful and illegal body who could be counted on to do anything. A convention to propose amendments is limited solely to proposing amendments and this is the subject of the plaintiff's motions. A Constitutional Convention is entirely unlimited and illegal and this is the obsession of defendant United States and *not* the subject of plaintiff's motions. Thus, plaintiff disagrees that the "purpose of the Constitutional Convention is to propose amendments." That is the purpose of the convention to propose amendments and therefore cannot be said to be the function of a Constitutional Convention. Plaintiff will leave it to the wild speculations of defendant United States to imagine what a Constitutional Convention would do.

However, when discussing a convention to propose amendments, the already discussed 14th Amendment comes into effect. Defendant United States has already admitted that convention delegates and members of Congress having the power to propose amendments form a class which must be treated equally under the law. Both are public offices the holder of which must suffer election before the citizen takes the office. As the 14th Amendment of equal protection applies, any qualifications therefore for office that affect one part of the class must affect the other part of the class equally. In this case this means the minimum eligibility requirements of members of Congress must meet in order to be elected must be applied to delegates to a convention to propose amendments, i.e., age, citizenship and residency and, as the Court has already ruled, Congress is not empowered to alter them, subtract from them, nor add to them.[xxxii]

Therefore if plaintiff meets these standards, which he does, of age, residency and citizenship, his eligibility for office is unquestioned and thus is concrete and particular in addition to be actual in fact. Thus, his eligibility is not conjectural but factual. It is also a fact plaintiff has made an attempt to file for the office of convention delegate with the State of Washington and was refused by the state.[xxxiii] While it defendant United States may argue the state is to blame in this denial of plaintiff's right, it is clear the denial is based on the fact Congress has not issued a call for a convention to propose amendments thus preventing the state from accepting candidates for election of convention delegates. Therefore a clear link between congressional refusal to call and the inability of plaintiff to file as a candidate is established. As Congress' refusal to call prohibits an election, it follows it also prohibits citizens from participating in that specific election as candidates for office. Thus, there is a

specific, concrete injury which Congress is specifically and expressly responsible for. A judicial ruling in plaintiff's favor causes the call for a convention to propose amendments. This causes an election and in the course of that election affords plaintiff the opportunity to file for office[xxxiv] and seek the public office of delegate to a convention to propose amendments. Thus all aspects of standing are satisfied in this matter.

Summed up, when properly presented as plaintiff has done, rather than distorted as defendant United States has done in its motion to dismiss, it is clear plaintiff has more than satisfied the issues of standing. Plaintiff therefore has standing.

This issue thus settled, this only leaves the issue of political question together with such other evidence as plaintiff may provide to refute defendant's motion to dismiss.

THE POLITICAL QUESTION ISSUE

Defendant United States begins the issue of political question by stating:

> "Because it has never successfully been invoked, the Convention method of amendment raises a host of fundamental and previously unanswered constitutional questions, answers to which are neither obvious nor unimportant to the very 'blueprint' of our Republic. Such questions include, but are no means limited:
>
> Precisely when and how is a Constitutional Convention to be convened?
>
> Must the subject matter of the applications of the requisite number of States be identical, or request substantially the same amendment, or merely deal with generally related issues?[xxxv]
>
> Must the requisite number of applications be submitted together, substantially contemporaneous or within several years of one another?
>
> Can a Convention be limited to consideration of the amendment or general subject matter that the Convention was convened to consider?"[xxxvi]

Defendant United States urges the Court to dismiss plaintiff's motion on the basis of lack of standing (an issue already addressed) and urges that plaintiff's motion "present[s] inherently 'political questions', the resolution of which are best left to the Legislative rather than to the Judicial Branch." It then asks questions as to the interpretation of the meaning and intent of the constitutional language of Article V, a clearly recognized function of the judiciary. Thus, it can only be assumed defendant United States take over the functions of the judiciary.

What the United States conveniently ignores is the convention clause of Article V is a constitutional process which like all constitutional processes should be as immune from the political process as possible. If the issue here before the Court were a specific amendment proposal and plaintiff were attempting to use the Court in some manner to achieve the defeat or passage of that amendment proposal by Court action, which has been the purpose of every single case regarding the amendatory process in the past, then the United States would be correct that such a case is a political question and thus should avoided by the Court. But this is not the case here. No amendment proposal is being discussed. What is being discussed is plain constitutional language, *the amendatory process itself absent of any amendment*, the law of the land and whether or not Congress must obey that law.

Defendant United States then suggests that the Court in deciding whether a case is a political question:

"must commence by examining the language of the relevant provision(s) of the Constitution to determine 'whether and to what extend the issue is textually committed [to either the legislative or Executive Branch of the government]' Nixon, 506 U.S. at 228; 113 S.Ct at 735."

Defendant United States then states:

"…the Constitution does not expressly address the myriad procedural questions surrounding the Convention method of amendment. The complete absence of any judicially discoverable and manageable standards applicable to a process in which Congress obviously plays so pivotal a role, strongly implies that Congress was meant to be the final arbiter of when the conditions precedent set for in Article V have been complied with sufficiently to warrant convening a Convention."[xxxvii]

In a footnote, defendant United States maintains that:

"[T]he Speech and Debate Clause, art. I § 6, cl. 1 and the doctrine of sovereign immunity furnish "additional grounds for dismissal [as]]t]he Speech and Debate Clause has been held to immunize legislative activity, and be extension inactive, related to consideration and passage or rejection of proposed legislation or other matters, such as the amendatory process… Similarly, suits against Congress attempting to compel Congress to take action have been barred on the basis of sovereign immunity."[xxxviii]

Defendant United States then refers to Coleman v. Miller, 307 U.s. 433, 59 S.Ct. 972 (1939) as an "analogous decision"[xxxix] where questions of how long a proposed amendment remained open to ratification and the effect of prior rejection had on a subsequent ratification were "committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp."

Defendant United States does not give *Coleman* its fair due. Assuming the defendant wishes to win his case, then it should allow *Coleman* its full flower. *Coleman* goes much farther than just holding the judiciary has no place in the amendatory process, not even to the extent of interpreting the meaning of the words of the Constitution, a clearly recognized power of judicial review. Using the ratification of the 14th Amendment as the basis of its decision where Congress legislated how states shall ratify a specific amendment, *Coleman* emphatically states that:

"Such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the article exclusively and completely to Congress."[xl]

The conclusion of this statement by the Supreme Court is obvious. The language of Article V speaks of two separate methods of amendment with at least two groups (the national government and the states or a convention to propose amendments and the states or one of the proposing bodies and the people) having to agree in a supermajority both at proposal and ratification level before the proposed amendment can take effect. *Coleman's* language replaces Article V with a politically motivated system where the entire process can be legislated by Congress. As the Supreme Court based its decision on the 14th Amendment, it is clear the Court meant to give Congress the power to legislatively dictate the outcome of a ratification vote by the states, employ military force to enforce that political desire and even allows for Congress to overthrow the legislature and replace it will members of its choosing should it vote contrary to Congress' desires. Obviously this power is all inclusive and thus provides Congress all the power it ever needs to regulate the ratification process. Therefore, under the principle of necessary and proper, Congress requires no more power in the amendatory process as is advocated by defendant United States to regulate the convention to propose amendments because it has total control of the ratification process.

The only portion of Article V *Coleman* did not address was a convention to propose amendments. Defendant United States asks the Court now to close this gap by giving Congress dictatorial powers over the entire amendatory process. It asks its veto of the clear and plain language of the Constitution, which it has admitted requires no interpretation,[xli] be sanctioned by the Court as no more than a "political question." Nothing in defendant's language in its motion to dismiss gives the slightest assurance that such a veto of the written

language of the Constitution will stop at this point of merely gobbling up Article V.

Once this power is established with the blessing of the Court, Congress will be able to decide which constitutional language, i.e., the law, it will obey. Congress "knows" someone is guilty of a crime (assuming it even bothers with the guarantees of a trial at all) and forces them to testify against themselves. Congress doesn't like guns, so it simply removes them. It doesn't like political criticism, so it silences it. It doesn't like a Court ruling, so it ignores it. If the possibility of a runaway convention at all concerns the Court, perhaps it should weigh the alternative of a runaway Congress before ruling in defendant United States favor.

Plaintiff can allege this alternative because the law at stake in this instance is nothing less than the expressed written language of the Constitution which Congress has vetoed. There is no other law or statute at issue as is usually the case in most constitutional questions. The Constitution stands along in this instance. Thus, defendant's assertion that the government is not required to act in accordance with [the] law,[xlii] it can only mean defendant United States holds it is not bound to obey the Constitution at all.

As with most dictatorial governments, defendant's admissions are illogical. On one hand, defendant United States admits it must call a convention to propose amendments. Simultaneously defendant United States says it cannot be compelled to do call a convention to propose amendments because it is a "political question" and thus the question of whether it should call a convention, i.e., obey the expressed, written language of the Constitution is best left to itself to decide.

The Court doctrines of standing and political question have a common element. All are based on the case law where constitutional

language either expressly, or by reasonable implication, gave discretion to the government in its actions. Most of these cases, for example, involved the taxation power of Congress which the courts have correctly ruled involve great discretion on the part of Congress. In this case, however, the Constitution gives no discretion or option to the government in the calling of a convention to propose amendments. Thus the case law is of little use where the Constitution provides no discretion or option to the government as to what action it must take in a specific situation. The issue thus evolves to the most basic possible: does the government which is supposed to be constrained by the Constitution have the right to veto the expressed written language of that document that is designed to constrain it?

THE POSITION OF THE FOUNDING FATHERS

As defendant United States seeks to answer this question in the affirmative, it is not surprising it neglects one step in the process the Court is obligated to examine before deciding a political question or for that matter, a question of standing. What was the original intent of the Founders when they wrote convention clause? Does their intent clarify the meaning and thus the textual commitment of the article to a coordinate branch? Was “Congress… meant to be the final arbiter of when the conditions precedent set for in Article V have been complied with sufficiently to warrant convening a Convention?” In this instance this question is of utmost importance. As there has been no intervening court rulings specifically on the issue of a convention to propose amendments and no statutory action on the part of Congress, the Court is left with only the Founders from which to obtain guidance and

meets them in this case, eyeball to eyeball, over the meaning of a pristine clause of the Constitution.

As with any law where there is question as to the meaning and intent, the Court is obligated to examine as records relating to the intent and meaning by the framers of that law, i.e., the legislature. In the case of the Constitution and specifically Article V, therefore, the Court must examine the factual record of the Founders to ascertain, if possible, the meaning and intent of the convention clause. Unlike many of the clauses where much intuition on the part of the Court is needed, the language of the Founders about the convention clause is specific, unequivocal and unanimous among the framers of the Constitution.[xliii]

All of these references however pail in comparison to the specific language of the author of the final draft of Article V, Alexander Hamilton, who specifically addressed the meaning and intent of the language of the convention clause in Article V in Federalist 85 when he wrote:

"In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. …

"But there is yet a further consideration, which proves beyond the possibility of a doubt, that this observation is futile. *It is this that the national rulers, whenever nine States concur, will have no option on the subject.* By the fifth article of the plan, the Congress will be obliged 'on the application of the legislatures of two thirds of the States which at present amount to nine, to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by convention in three fourths thereof.' *The words of this article are peremptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body.* And of consequence, all the declamation about the disinclination to a change vanishes in air.

"If the foregoing argument is a fallacy, certain it is that I am myself deceived by it, for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of a mathematical demonstration."[xliv]

In all of this it must be remembered the United States is attempting to commit an unlawful and illegal act. The Constitution is above all else, law. The United States has violated that law. Like all fugitives when caught in the act, it does not own up to its misdeeds. Instead it seeks to “get off” by involving the Court as an accomplice in its conspiracy.

The Constitution, like a chain, is only as strong as its weakest link. Once the Court has sanctioned, by whatever means, the “right” of the government to veto the Constitution, that chain is broken and any restraints on the government shift from the people to the convenience of the government. As noted above, there is nothing to say the first target of that emancipated government will not be to ignore all future court orders, rulings and findings which seek to otherwise regulate a government gone wild with power.

The convention clause of the Constitution is meant to be the most powerful check and balance in the Constitution. It is to be peremptory, that is that it first among all clauses of the Constitution and is meant to provide no option for the government in carrying out its mandate.

Hence even though the plaintiff can prove such standing, any argument of standing, or any other Court doctrine such as political question, sovereign immunity, speech and debate clause, must in the face of this expressed language, fall as unconstitutional violations of the convention clause. Their use provides an option to the government whereby it may ignore, veto or otherwise negate the clear intent and meaning of the clause.

The United States has already conceded the convention clause requires no inference nor interpolation. Therefore, as Hamilton was the author of Article V in its final form, and as there has been no

interpolation either by Court or legislature since that time, it is beyond question the Court should consider his interpretation as to intent and meaning of his own work with the highest regard and creditably.

Thus, the argument surely to be proposed by defendant United States that the term “national rulers” only applies to Congress leaving other national rulers such as the executive or judiciary free to accomplish the same mischief the Founders sought to prevent with the words, “shall call a convention” is without merit, if not logic. These rulers are as equally bound to see the provision is enforced and are as equally prevented from providing any option in the matter as Congress. In any event, the sentence, ‘The words of this article are peremptory’ establishes the hierarchy of constitutional language and thus defeats any discretion on the part of any national ruler be they Court, legislature or executive. Thus, it is conclusive the Court may not employ any discretion or option which would defeat this constitutional language as it peremptory on all national rulers. As standing, political question and so forth are a Court discretion which would defeat this constitutional clause, therefore, they may not be used by the Court to defeat this peremptory language as such discretion is, in this instance, unconstitutional and invalid.

The matter carried to its ultimate logical conclusion is clear: the federal government may, in no manner whatsoever, use any discretionary power in any fashion from any branch of national government to obstruct or defeat the calling of the convention to propose amendments.

The convention to propose amendments clause is unique in the Constitution. While other clauses either present a structure, provide a discretion, limit government or

guarantee a right, the convention clause is the only clause in the Constitution that commands an action on the national government based on the action of an outside body. It provides no option and therefore as Hamilton stated “is peremptory” not only on Congress but all the Constitution. It is an independent and self-contained clause requiring no interpretation nor intervention by any other body. The fact of whether or not a citizen has or has not standing does not excuse this mandated action on the part of Congress nor does the fact it may be a “political question.” These were neither contemplated nor permitted by the Founders in their formulation of the convention clause. “No option” means no option.

CONCLUSION

It for all of the above reasons set forth above, defendant United States Motion to Dismiss should be denied.

Dated this _____ day of January, 2001.

Respectfully submitted to the Court for its consideration.

_____

Bill Walker, Plaintiff, pro se

ENDNOTES

[i] Miyazawa v. City of Cincinnati, 45 F.3d 126,127 (6th Cir. 1995); Luden's Inc. v. Local Union No. 6 of Bakery, Confectionery $ Tobacco Workers' Int'l Union of America, 28 F.3d 347, 353 (3d Cir. 1994).
[ii] Defendant's Motion to Dismiss, p.2, ¶1.
[iii] For example, defendant's Motion to Dismiss, p.8, ¶ 1-4.
[iv] The 200 plus Supreme Court decisions besides being noted in the various footnotes of the brief were summed on pages 8-13 of the overlength brief.

Likewise, plaintiff provided references to the individual applications in the brief by citing them solely by Congressional Record, p.16-27, in Appendix B of the ABA Report and in tables derived from United States Senior District Court Judge for the District of North Dakota Bruce Van Sickle who in 1990 determined Congress was obliged to call a convention to propose amendments, p.664-677. *See also* Van Sickle, Boughey, "*A Lawful and Peaceful Revolution: Article V and Congress' Present Duty to Call a Convention for Proposing Amendments*", 14 HAM. L. REV. (1990).
[v] While defendant United States did complain about lack of detail surrounding the applications (Footnote 2, defendant's Motion to Dismiss) there is no expressed denial by defendant United States of *any* application. Thus, all must be admitted.
[vi] See Brief in Support, p.2.
[vii] Defendant's Motion to Dismiss, p.1-2. Emphasis in original text.

Defendant United States has stated a significant factual error regarding plaintiff's proposed order. Defendant states (in part): [plaintiff seeks an] Order compelling Congress to convene *and conduct* a Constitutional Convention *via the Internet*…" (emphasis added in first instance, emphasis in original text in second). Nowhere does plaintiff in his Order suggest Congress should "conduct a Constitutional Convention. Instead the opposite is true. Indeed, the proposed order makes it clear Congress has a miniscule clerical role in the matter and under the terms of the necessary and proper clause, (*see* p.12-13) has no authority whatsoever to regulate or conduct the convention.
[viii] See Dodge v. Woolsey, 59 U.S. 331 (1855); Hawke v. Smith, 253 U.S. 221 (1920); Dillon v. Gloss, 256 U.S. 368 (1921); United States v. Sprague, 282 U.S. 716 (1931).
[ix] Defendant's Motion to Dismiss, p.3.
[x] Any dispute as to this point is settled by examination of plaintiff's proposed order which specifically forbids a convention to propose amendments from writing a new constitution. See p.15, proposed order.
[xi] Defendant's Motion to Dismiss, p.2.
[xii] *See* United States v. Sprague, 282 U.S. 716 (1931): "The United States asserts that article 5 is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true."
[xiii] This admission alone defeats defendant's assertion that this matter is best left to the Legislature as the defendant admits there is no constitutional way by which the legislature can resolve the issues. However, plaintiff will not leave the matter here as there are even stronger arguments which he will present later in this response.
[xiv] Defendant's Motion to Dismiss, p. 3-4.
[xv] Plaintiff's complaint, p.2, ¶ 4. (emphasis added).
[xvi] The obvious argument by defendant United States that this is some harmless oversight on its part is without merit. Plaintiff has discussed this right as a basis of standing extensively. See

plaintiff's complaint, ¶ 4; his Declaratory motion, p.5; his overlength brief, p.404-500; his proposed order, p.1-2 and his replacement brief, p.3-4.

[xvii] Defendant's Motion to Dismiss, p.2-3.

[xviii] Any doubt as to this statement being the correct interpretation of plaintiff's meaning as to "right to vote" can be settled by the Court by examining pages 57-67 of his overlength brief. While plaintiff realizes that brief may be used in this case as it was denied by the Court, nevertheless it is a clearly recognized principle of law that plaintiff has the right to defend against a possible challenge to his veracity by defendant United States in so far as his stating what was his intent and meaning regarding the phrase "right to vote." For this limited purpose, plaintiff submits that portion of the overlength brief as proof of his intent and meaning.

[xix] *See* Twining v. New Jersey, 211 U.S. 78 (1908) which stated: ""Privileges and immunities of citizens of the United States...are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. ... Thus, among the rights and privileges of national citizenship recognized by this court are... *the right to vote for national officers*...and the right to inform the United States authorities of violation of its laws." (emphasis added).

[xx] Please see copy of plaintiff's voter card attached to the end of this response showing him to be a registered voter in the State of Washington residing within a recognized congressional voting district. Thus, plaintiff is qualified to vote for national officers.

[xxi] Defendant's Motion to Dismiss, p.4, ¶ 1.

[xxii] Defendant's Motion to Dismiss, p.1, ¶ 1.

[xxiii] This concept is so novel in fact, plaintiff challenges defendant to show *any* source, other than its motion to dismiss, most especially the Founding Fathers, where such a concept of representation was ever even proposed. Plaintiff is unable to find such a source and therefore must conclude defendant United States created this legal theory of representation out of its imagination. Such wild, unsupported accusations only serve to demonstrate the need for reasoned judicial interpretation in this area.

[xxiv] *See* Hawke v. Smith, 253 U.S. 221 (1920).

[xxv] The clause in question reads:

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

It should be noted that plaintiff using this clause *does not* negate his argument regarding the Necessary and Proper Clause. That clause refers (in part) to: "other Powers vest by the Constitution in the *Government* of the United States, or in any Department or Officer thereof." (emphasis added). By no stretch can the terms used in the clauses be considered interchangeable. One deals with offices created under the authority of the United States (i.e., the Constitution) and the other deals with the powers of the government of the United States (i.e., the enumerated powers expressed in Article I, Section 8, Clauses 1-17).

[xxvi] Defendant's Motion to Dismiss, p.4, ¶ 2.
[xxvii] Defendant's Motion to Dismiss, p.4-5, ¶ 3.
[xxviii] Again, for limited purpose of establishing the veracity of plaintiff's statement, plaintiff refers to p. 76-85 of his overlength brief..
[xxix] Defendant's Motion to Dismiss, p.5. (emphasis added).
[xxx] Defendant's Motion to Dismiss, p.4, ¶ 2.
[xxxi] Defendant's Motion to Dismiss, p.4, ¶ 2.
[xxxii] *See* Powell v. McCormack, 395 U.S. 486 (1969).
[xxxiii] *See generally* letters to State of Washington Secretary of State attached to plaintiff's replacement brief.
[xxxiv] As to the anticipated objection of defendant United States, it is clear the 14th Amendment equal protection clause mandates that all present laws regarding election of national officers, i.e., senators and representatives, equally apply to candidates for convention delegate. Thus the procedures for filing and other related issues are already well established and well settled thus requiring no further detail on the part of the plaintiff.
[xxxv] Defendant makes a sly assumption here that plaintiff will not allow. Defendant *assumes* the subject matter of the applications by the states matters in whether a convention is called. As the evidence plaintiff will present later in this brief shows, subject matter, along with all the other issues presented by defendant have no bearing whatsoever on whether a convention is called by Congress. Article V deals only with a total number of applications from a specified number of states, not the subject matter of them. It is totally silent on same subject, contemporaneousness, limited agenda *because none were ever intended to be considered in the matter regarding a call*. It is not silent on when a convention shall be called. As to the "how" as this was discussed in plaintiff's overlength brief and denied by the Court such matters must be considered to be "well settled."
[xxxvi] Defendant's Motion to Dismiss, p.7-8, ¶ 3. As defendant United States refers to a Constitutional Convention and not to a convention to propose amendments, it is a reasonable inference that such questions as these deal with a Constitutional Convention. On that point, plaintiff agrees that an illegal, unrecognized, unlawful action such as a Constitutional Convention *would* raise such questions. Such is not the case for the convention to propose amendments. All of these questions were dealt with in great depth in plaintiff's overlength brief (see p.276-403) and shown to be nothing more than unconstitutional standards raised solely for the political purpose of giving Congress powers it was not intended to have in order to defeat the calling of a convention to propose amendments. As the Court in its refusal to admit these questions for discussion by not admitting the brief they were contained in, clearly has shown it considers them "well settled" as presented by the plaintiff which is they have no validity whatsoever. Plaintiff will not therefore comment on any of them any further.
[xxxvii] Defendant's Motion to Dismiss, p. 7-8.
[xxxviii] Defendant's Motion to Dismiss, p.8, Footnote 3.
[xxxix] If there is such an "analogous decision" in this matter, then it is not *Coleman* but Powell v. McCormack, 395 U.S. 486 (1969). Not only is it more contemporary than *Coleman* but it addresses the true issue of this case: does Congress have the power to add to the written language of Constitution (without bothering with an amendment) as it attempted to do in *Powell* or subtract from the expressed written language of the

Constitution as it attempting to do here? In *Powell*, the House of Representatives maintained it had the right to add additional terms to the terms of office expressed in the Constitution (age, citizenship and residency) that a citizen had to fulfill to become a member of that body. Here defendant United States maintains it may ignore the convention clause thus removing words entirely from the Constitution.

As the convention clause is obligatory on every member of Congress, it is not an unreasonable inference to assert it too is a term of office for Congress, i.e., a member of Congress shall be at least a certain age, shall reside in a certain location, shall be a citizen for a period of time and, should the states apply for a convention in sufficient number, call a convention to propose amendments.

In *Powell* the Supreme Court ruled that Congress *did not* have the power to add nor subtract from the expressed written of the Constitution and more certainly did not have that power when it came to changing the terms of office expressed in the Constitution. The analogy is direct and clear.

[xl] Coleman v. Miller, 307 U.S. 433, 459 (1939).

[xli] See plaintiff's Replacement Brief, p.2, footnote 5.

[xlii] Defendant's Motion to Dismiss, p.3, ¶ 3.

[xliii] Among Founders who commented on the meaning of the convention clause were Wilson Nicholas. At the Virginia Ratification Convention, he said:

"The worthy member [Patrick Henry] has exclaimed, with uncommon vehemence, against the mode provided for securing amendments. He thinks amendments can never be obtained, because so great a number is required to concur. Had it rested solely with Congress, there might have been danger. The committee will see that there is another mode provided, besides that which originates with Congress. *On the application of the legislatures of two-thirds of the several states, a convention is to be called to propose amendments, which shall be part of the Constitution when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof*. It is natural to conclude that those states who will apply for calling the convention will concur in the ratification of the proposed amendments." 3 ELLIOT'S DEBATES 49 (1937) at 88-89. (emphasis added).

It is clear James Madison also understood the intent of Article V, that the purpose of the applications by the states was not to favor a particular amendment proposal but to compel Congress to call a convention. In a letter written to George Eve, January 2, 1789, Madison wrote:

"I have intimated that the amendments [referring to the yet to be written Bill of Rights] ought to be proposed by the first Congress. I prefer this mode to that of a General Convention. 1st. Because it is the expeditious mode. *A convention must be delayed, until 2/3 of the State Legislatures shall have applied for one; and afterwards the amendments must be submitted to the States:* whereas if the business be undertaken by Congress the amendments may be prepared and submitted in March next." (emphasis added) UNFOUNDED FEARS: MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION (1989) (P. Weber, B. Perry).

The language is unequivocal. Madison clearly understood the purpose of the applications by the states was to cause a convention to be called, *not* to submit a subject to Congress for that body to approve. While he clearly recognized the congressional method of

proposal was more “expeditious”, nevertheless his words are clear and unambiguous regarding the purposes of applications to Congress for a convention.

This is not the only example where Madison’s interpretation was expressed and agreed to by other Framers:

“Framer John Dickinson, in a newspaper essay, agreed: ‘whatever their [Congress] sentiments may be, they [Congress] *must* call a convention for proposing amendments, on the applications of two-thirds of the legislatures of the several states.’(1)

“In a published letter, Madison wrote: ‘the question concerning a General Convention, does not depend on the discretion of Congress. If two thirds of the States make application, Congress cannot refuse to call one; if not, Congress have no right to take the step.’(2) On May 5, 1789, when Virginia’s convention application was resented to Congress, Madison informed his colleagues in the House of Representatives that when ‘two-thirds of the State Legislatures concurred in such application,... it is out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this natures.’ From the words of article V ‘it must appear that Congress have no deliberative power on this occasion.’”(3) Caplan, *Constitutional Brinksmanship: Amending the Constitution by National Convention*, (1988)(emphasis in original). Footnotes as noted below:

(1) 3 *Elliot* at 636; 4id. at 178; Letter No. 8 of “Fabius” (John Dickinson), in P. Ford, ed., *Pamphlets on the Constitution of the United States* 204, 210 (1888) (letters first published serially in the *Delaware Gazette* [Wilmington], 1788; first pamphlet ed., 1797).

(2) James Madison to Thomas Mann Randolph, Jan. 13, 1789, in 11 *Madison Papers* at 417. The letter was published in the *Virginia Herald* on January 15, in the *Virginia Independent Chronicle* on January 28, and in other periodicals. R. Ketcham, *James Madison: A Biography* 276(1971). Similarly, James Madison to George Eve, Jan. 2, 1789, in 11 *Madison Papers* at 405.

(3) 1 *Annals of Cong.* 260 (1789). Similarly, id. at 260-61 (Reps. Boudinot, Bland, and Tucker); 5 id. at 498, 530 (1796) (Reps. Smith and Lyman).

[xliv] Federalist 85. (emphasis added).